

ENTERED ON DOCKET
MAR 18 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 02-74350-JEM
	:	
Apyron Technologies, Inc.,	:	CHAPTER 11
	:	
Debtor.	:	JUDGE MASSEY
	:	
Sherman M. Ponder,	:	
	:	
Plaintiff,	:	
	:	
v.	:	ADVERSARY NO. 04-6443
	:	
Apyron Technologies, Inc.,	:	
	:	
Defendant.	:	
	:	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this adversary proceeding Plaintiff, Dr. Sherman M. Ponder, asks the Court for a declaratory judgment that he is the sole owner of certain intellectual property (the "Ice Wand") he helped develop while working for the Debtor and Defendant, Apyron Technologies, Inc. Plaintiff acknowledges in his complaint that he is obligated by contract to transfer his interest in the Ice Wand to Defendant. Nonetheless, he asserts that he need not hold up his end of the bargain and remains the owner of that technology because Defendant has not paid him all of the compensation he is due.

Defendant disputes Plaintiff's contentions and has filed several counterclaims, including ones seeking (1) a declaratory judgment that it owns the Ice Wand, (2) a permanent injunction

restraining Plaintiff from asserting or claiming any interest in the Ice Wand, (3) partial disallowance of Plaintiff's proof of claim (proof of claim No. 55), reducing it in value to \$6,023.08 and (4) subordination of Plaintiff's proof of claim.

Defendant moves for summary judgment on its counterclaims noted above. Plaintiff has not responded to Defendant's motion and by local rule is deemed not to oppose it. BLR 7007-1(b) N.D. Ga.

Section 157(b)(1) of Title 28 of the United States Code provides:

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

Subsection (2) of section 157(b) provides a non-exclusive list of core proceedings arising under Title 11. A bankruptcy judge may hear a proceeding that is not core but may not enter a final judgment unless the parties consent. 28 U.S.C. § 157(c)(2). Absent consent, as here, the bankruptcy court makes a recommendation to the District Court. 28 U.S.C. § 157(c)(1).

A bankruptcy judge must first decide whether a proceeding is or is not a core proceeding. 28 U.S.C. § 157(b)(3). Here, the question is whether the portion of this proceeding in which the parties seek determination of who owns the Ice Wand is a core proceeding. It is non-core because this issue does not turn on a provision in, or invoke a substantive right under, the Bankruptcy Code and because Plaintiff's claim of ownership existed prior to the filing of the bankruptcy case. *See Cont'l Nat'l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1348-49 (11th Cir. 1999). Therefore, on the issue of the ownership of the Ice Wand, this Court respectfully submits these

proposed findings of fact and conclusions of law to the District Court for final resolution. 28 U.S.C. § 157(c)(1).

If the District Court were to determine Defendant owns the Ice Wand, then that technology is property of the estate. In that event, the portion of the proceeding in which Defendant seeks an injunction to prevent Plaintiff from interfering with its reorganization and property of the estate would be a core matter. *See In re Toledo*, 170 F.3d at 1348-49. (The Court notes that section 362(a) of the Bankruptcy Code already imposes an injunction against exercising "control over property of the estate.") On the other hand, if the District Court were to determine Plaintiff owns the Ice Wand, then it is not property of the estate and no injunction would be proper. This Court will defer further action on this portion of the motion until after the District Court rules.

The parts of the counterclaims in which Defendant objects to Plaintiff's proof of claim and seeks to subordinate that claim are core proceedings. 28 U.S.C. § 157(b)(B); *See In re Toledo*, 170 F.3d at 1345, 1347. This Court will rule on those issues in a separate judgment.

Pursuant to Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056, a party moving for summary judgment is entitled to prevail if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party carries the initial burden of proof and must establish that no genuine factual issue exists. *Celotex*, 477 U.S. at 323; *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The moving party must point to the pleadings, discovery responses or supporting affidavits which tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The court will construe the evidence in

the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987).

In support of its factual contentions, Defendant submitted a Statement of Undisputed Facts and the affidavits of Leslie J. Story, Defendant's President and CEO, Brian E. Kepner, Defendant's former Chief Technical Officer and John A. Reade, Defendant's Vice President of Finance and Human Resources. The following findings of fact are drawn from these documents, which represent the only evidence in the record, other than the responses to the complaint and the counterclaims.

Defendant hired Plaintiff on April 30, 2001 at an annual salary of \$58,000. Story Affidavit, ¶3. As a condition of his employment Defendant required Plaintiff to execute a "Non Disclosure Agreement," which all Defendant's employees must execute. Story Aff., ¶3-4; Reade Affidavit, ¶5.

The Non-Disclosure Agreement recites that the promises made by Dr. Ponder are in consideration of the employment of Dr. Ponder by Defendant for which he would receive a salary. The portions of the contract relevant to the ownership of the Ice Wand technology are as follows:

1. Definitions

...

- c. Developments shall mean all discoveries, inventions, improvements, computer programs and related documentation and other works or authorship (whether or not patentable or subject to any other form or protection) which in any way (i) relate to the Business of the Company or its activities; or (ii) relate to the Company's actual or demonstrably anticipated research and development.

2. Ownership, Non-Disclosure and Non-Use or Confidential Information, Trade Secrets and Developments

- a. The Employee acknowledges and agrees that all Confidential Information, Trade Secrets and Developments conceived, made or written by the Employee, and all physical to (sic) and shall be and remain the sole and exclusive property of the Company and that any Developments conceived, made or written by him or her shall be considered work for hire. The Employee agrees immediately to (I) disclose to the Company all Developments conceived, made or written in whole or partly by him or her during the term of their employment with the Company, (ii) to assign to the Company any right, title, or interest he or she may have in such Developments, and (iii) at the request and expense of the Company, to do all things and sign all documents or instruments reasonably necessary in the opinion of the Company to eliminate any ambiguity as to the rights of the Company in such Developments including, without limitation, providing, to the Company his or her full cooperation in any litigation or other proceeding to establish, protect or obtain such rights. . . .

Exhibit B to Story Aff., pp. 1-2.

The Non-Disclosure Agreement also provides it will continue to bind Plaintiff post-termination and includes a choice of law clause specifying Georgia law. Exhibit B to Story Aff., pp. 2-3.

In late 2001, Defendant offered Plaintiff an opportunity to receive a bonus of \$25,000, half in cash and half in Apyron stock, along with a 15% increase in his base salary. Story Aff., ¶8; Exhibit D to Story Aff.; Reade Aff., ¶7. The bonus and salary increase were to vest “[u]pon successful introduction of a commercially ready Apyron “ice stick” anti-microbial device at the National Restaurant Show in the late spring of 2002. . . .” Story Aff., ¶8; Exhibit D to Story Aff.

Plaintiff worked for Defendant, under the supervision of Mr. Kepner, to develop a functioning Ice Wand that the Defendant could then sell. Story Aff., ¶6; Kepner Aff., ¶6. The Ice Wand device is designed to limit the growth of microbes in water, specifically water used in ice machines and humidifiers. Story Aff., ¶7.

On March 6, 2002, Defendant filed a provisional application for the technology in the device, Provisional Application Number 60/361,997, with the U.S. Patent and Trademark Office. Story Aff., ¶7. The Patent Application lists Brian E. Kepner and Plaintiff as the inventors of the Ice Wand. Story Aff., ¶7; Kepner Aff., ¶7. See Story Aff., Exhibit C.

Defendant introduced an Ice Wand device at the 2002 National Restaurant Show, and it appeared to be a “big success.” After the show, however, Defendant was unable to cause the device to meet testing specifications and could not replicate earlier successful experiments. Story Aff., ¶9; Kepner Aff., ¶8. Defendant recalled devices that had been sold. Story Aff., ¶9; Reade Aff., ¶7.

Plaintiff resigned effective May 24, 2002. Reade Aff., ¶6. Defendant admits it owes Plaintiff unpaid salary for five weeks and two days but contends Plaintiff failed to achieve the terms for the bonus and salary increase. Reade Aff., ¶6-7. Following significant redevelopment in the fall of 2002, Defendant successfully replicated the earlier tests which enabled Defendant to successfully manufacture and market the Ice Wand. Kepner Aff., ¶8.

Plaintiff has filed two proofs of claim in Defendant’s bankruptcy case. The first proof of claim, No. 55, filed on May 8, 2003, asserted a claim in the amount of \$41,496.50 for unpaid wages, vacation pay, severance pay and a bonus. Dr. Ponder filed a second proof of claim, No. 221, on May 24, 2003 in which he checked a box that he was amending an earlier claim. The first sentence on the second page of claim No. 221 states, “This claim apends (sic) claim number 55.” In this amendment, he asserted a claim for \$422,643.46 based on his alleged rights in the Ice Wand technology. He states that the claim is not based on an employment contract. On July 14, 2004, Dr. Ponder withdrew claim No. 221.

The issue of who owns the Ice Wand technology turns on the meaning of the Non-Disclosure Agreement. Georgia law, which governs this contract, applies a three-step process to the construction of a contract. *Travelers Ins. Co. v. Blakely*, 255 Ga. 699, 700, 342 S.E.2d 308, 309 (1986); *Ga.-Pac. Corp. v. Lieberam*, 959 F.2d 901, 904 (11th Cir. 1992). The court first decides if the contract's language is ambiguous and, if it is, the court then applies any applicable rules of construction. *Lieberam*, 959 F.2d at 904; GA. CODE ANN. § 13-2-2 (2004). "Ambiguity in a contract is defined as duplicity, indistinctness or an uncertainty of meaning or expression." *Horwitz v. Weil*, 275 Ga. 467, 468, 569 S.E.2d 515, 516 (2002) (citing *Kuehn v. Selton & Assocs.*, 242 Ga. App. 662, 530 S.E.2d 787, 792 (2000)). If ambiguity remains after applying the rules of construction, the judge in a bench trial or a jury must resolve the factual issue. *Blakely*, 342 S.E.2d at 309.

At first glance, the first two sentences in paragraph 2a of the Non-Disclosure Agreement might appear to create an ambiguity. The first sentence of that paragraph states that all "[d]evelopments conceived, made or written by the Employee, and all physical to (sic) and shall be and remain the sole and exclusive property of the Company" The second sentence states that the employee agrees immediately "to assign to the Company any right, title, or interest he or she may have in such Developments" If an assignment were required to transfer ownership, the first sentence would be superfluous. But if the first sentence means what it says, the second sentence could be construed to contradict the first, thereby creating an ambiguity. The apparent ambiguity is resolved by reading the sentences together to mean that if required by Defendant, Plaintiff would execute an assignment to confirm what was already the case – that Defendant owns the technology. The purpose of imposing such a duty on an employee is to avoid the very situation

this proceeding presents – an employee contending he owns what he does not and broadcasting that baseless contention to third parties, who may not have the time or inclination to ferret out the truth. Read this way, the clauses complement and support, rather than contradict, each other.

Even if the two sentences read together were deemed to be ambiguous, rules of construction resolve the issue of the meaning of the contract.

“The construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part.” OCGA § 13-2-2(4). “The contract is to be considered as a whole, and each provision is to be given effect and interpreted so as to harmonize with the others.” (Footnote omitted.) *Ga. Farm &c. Ins. Co. v. Gaster*, 248 Ga.App. 198, 199, 546 S.E.2d 30 (2001). “The construction of the contract should give a reasonable, lawful and effective meaning to all manifestations of intention by the parties rather than an interpretation which leaves a part of such manifestations unreasonable or of no effect.” (Citations and punctuation omitted.) *Sheridan v. Crown Capital Corp.*, 251 Ga.App. 314, 316(1), 554 S.E.2d 296 (2001). And any construction that renders portions of the contract language meaningless should be avoided. *Deep Six v. Abernathy*, 246 Ga.App. 71, 74(2), 538 S.E.2d 886 (2000).

Thomas v. B & I Lending, LLC, 261 Ga. App. 39, 42, 581 S.E.2d 631, 634 (2003).

As discussed above, deciding that Defendant owned discoveries made by Plaintiff only if Plaintiff executed an assignment would not uphold the contract “in whole and in every part,” GA. CODE ANN. §13-2-2(4), and would render the first sentence of paragraph 2a a nullity. Hence, the Non-Disclosure Agreement provides that Defendant owns the Ice Wand and all related discoveries of technology made by Plaintiff while in Defendant’s employ.

Defendant’s admitted failure to pay part of Plaintiff’s salary does not render the assignment clause unenforceable, as Plaintiff contends in his complaint. Under the terms of the Non-Disclosure Agreement, Defendant became the owner of all “Developments” as they occurred. In arguing that he owns the Ice Wand technology, Plaintiff is in effect asserting a right to rescind the Non-Disclosure Agreement, which contains no provision permitting rescision, and to keep the rights

to all Ice Wand technology for himself. Georgia law provides for a right to rescission for fraud, GA. CODE ANN. § 13-4-60, but there is no other Georgia statute dealing with contracts generally (as opposed, for example, to sales contracts) that permits rescission as a remedy for a simple breach of contract.

Rescission of a contract is a complete abrogation of the contract; it does not leave the parties where the rescission finds them. The parties must be returned as nearly as possible to the status quo ante. *Corbitt v. Harris*, 182 Ga. App. 81, 82 (354 S.E.2d 637) (1987).

S. Prestige Homes, Inc. v. Moscoso, 243 Ga. App. 412, 417, 532 S.E.2d 122, 126 (2000). It is impossible to return the parties here to the same position as they were on the date that Defendant first employed Plaintiff.

Plaintiff has an adequate remedy at law for his claim against Defendant for salary. Under Georgia law, a trial court may not grant equitable relief if a party has an adequate remedy at law. *Housing Auth. v. MMT Enters.*, 267 Ga. 129, 475 S.E.2d 642 (1996). Plaintiff worked for Defendant for over one year. Plaintiff makes no contention that he was not paid, except as set forth in his initial proof of claim. There, he asserted that Defendant failed to pay him for a total of only seven weeks. Plaintiff's adequate remedy at law was to sue for unpaid salary prior to the bankruptcy case and to file a proof of claim thereafter. This is the only remedy he has.

Defendant's motion for summary judgment and Plaintiff's complaint raise the issue of whether there is a single employment contract that included the Non-Disclosure Agreement or whether there were two separate contracts consisting of an employment agreement and the Non-Disclosure Agreement. The Court need not resolve this issue because its outcome does not affect the ownership issue.

Accordingly, this Court respectfully recommends to the United States District Court for the Northern District of Georgia that it grant a partial summary judgment to Defendant, declaring that Defendant owns the Ice Wand.

The Clerk is directed to transmit these proposed findings of fact and conclusions of law along with the record in this adversary proceeding to the Clerk for the United States District Court for the Northern District of Georgia and to serve a copy of these proposed findings of fact and conclusions of law on the parties.

IT IS SO ORDERED.

This 17th day of March 2005.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE